

FILED

APR - 9 2002

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Columbia Manufacturing, Inc.
165 Route 66E
P.O. Box 368
Columbia, CT 06237,

PLAINTIFF

V.

United States of America
555 4th Street, N.W.
Washington, D.C. 20001

and

U.S. Department of the Air Force
Headquarters Oklahoma City
Air Logistics Center
Tinker Air Force Base
OK, 73145,

DEFENDANTS.

CASE NUMBER 1:02CV00666

JUDGE: Emmet G. Sullivan

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 04/09/2002

ECF

COMPLAINT

Plaintiff Columbia Manufacturing, Inc. brings this action for Declaratory Judgment and other relief requiring Defendant to respond to Plaintiff's request for documents pursuant to the Freedom of Information Act ("FOIA").

Parties

1. Plaintiff is a small business government contractor, a manufacturer of airplane engine parts. Plaintiff is incorporated in the State of Connecticut.

2. Plaintiff complains about the conduct of Defendant, United States of America, who acted by and through the United States Department of the Air Force, Tinker Air Force Base.

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Jurisdiction

3. This court has original jurisdiction arising under FOIA, 5 U.S.C. §552(a)(3) and §552(a)(4)(B).

4. This Court has original jurisdiction to review the federal questions contained herein, arising under the laws of the United States. See 28 U.S.C. §1331 (1995). This Court has original jurisdiction to review the claims contained herein, that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority. See 5 U.S.C. §702.

5. This Court may compel a federal agency or officer or employee thereof to perform a duty owed to the plaintiff. See 28 U.S.C. §1361, 5 U.S.C. §552(a)(4)(B). Relief may be granted under the Administrative Procedure Act, 5 U.S.C. §706, FOIA, 5 U.S.C. §552(a)(4)(B), and the Declaratory Judgment Act, 10 U.S.C. §§2201-02.

6. A requester is deemed to have constructively exhausted its administrative remedies with respect to a FOIA request where an agency fails to respond to the FOIA request within the statutory time limits. Thus, the requester may seek judicial enforcement of its request. See 5 U.S.C. §552(a)(6)(C). See also Pollack v. Department of Justice, 49 F.3d 115, 118 (4th Cir. 1995), where the court held that a FOIA requester is deemed to have constructively exhausted administrative remedies, reasoning that the agency failed to "notify the requester of its decision whether and how it will comply, its reasons for that decision, and

the requester's right to appeal any adverse determination to the agency head. See 5 U.S.C. §552(a)(6)(A)(i). In addition, in Oglesby v. The United States Department of the Army, 920 F.2d 57, 67 (D.C.Cir. 1990), the court held that a FOIA requester is deemed to have constructively exhausted administrative remedies when the agency's letter "did not provide notice of appellant's right to appeal" and thus the FOIA requester was "free to file suit under 5 U.S.C. §552(a)(6)(c)."

Standing

7. Plaintiff has standing to bring this action. Plaintiff has "suffer[ed] a legal wrong because of agency action, [and is] . . . adversely affected [and] . . . aggrieved by agency action with the meaning of" the federal statutes and regulations in Counts I, II, and III. See 5 U.S.C. §702.

Venue

8. This Court is the proper venue for this action. See 5 U.S.C. §552(a)(4)(B); 28 U.S.C. §1391(e); 5 U.S.C. §703.

Statement of the Case

9. Summary: This action is summarized in this paragraph and alleged with particularity in the following paragraphs. This action is against the United States Air Force for failing to respond to Plaintiff's FOIA requests and for improperly withholding documents from Plaintiff.

FOIA Request 1 (Number 2002-055)

10. On 26 October 2001, Defendant received Plaintiff's FOIA request via facsimile. The FOIA request is dated 25 October 2001¹.

11. The FOIA request was for various documents associated with contract numbers and purchase orders F34601-99-C-0092, F34601-99-D-0186-0001, F34601-99-D-0186-0003, F34601-99-D-0186-0004, F34601-99-D-0145-0002, F34601-99-D-0151-0002, F34601-00-C-0017, F34601-00-C-0043, F34601-C-0059, and F34601-99-C-0093 that Defendant awarded to Plaintiff.

12. The request indicated that Plaintiff would be willing to pay \$500.00 for the requested documents, and that Defendant must contact Plaintiff before exceeding that amount:

The undersigned agrees to pay reasonable fees associated with this request. However, if you anticipate costs will exceed \$500.00, please advise the undersigned before incurring them. In your response, please refer to the instant FOIA request by including a copy of it with your response.

13. On 20 November 2001, Plaintiff's undersigned counsel requested that Defendant modify the dollar limit set forth in Plaintiff's FOIA request from \$500.00 to \$2,000.00.

14. In a letter dated 30 November 2001, Defendant stated "[t]his office finds that additional time is needed to conclude processing; therefore, a response will be forwarded to you

¹ Two FOIA requests were prepared on 25 October 2001 and faxed on 26 October 2001. The second request is discussed below.

approximately 12 Dec 01."

15. In a letter dated 11 January 2002, Defendant informed Plaintiff that "the request was reviewed and the information determined to be releasable under 5 U.S.C. and is enclosed".

16. Defendant's letter requested that Plaintiff pay a fee of \$305.30 for the furnishing of the documents.

17. Subsequently, in a letter dated 22 January 2002, Plaintiff responded to Defendant with regard to the FOIA request ("Ref(1)") and Plaintiff's letter of 11 January 2002 ("Ref(2)"), stating:

Ref(2) is non-responsive to line item no. 4 of the FOIA request. Please provide a response to paragraph 4 of ref(1), which states as follows: All material that the Government relied upon in issuing the aforementioned cure notices for the referenced contracts. The FOIA request has been pending for several months.

In a letter dated 4 February, Defendant assigned number 02-148 to Plaintiff's request of 22 January 2002.

18. On 4 February, Defendant responded with a letter which stated:

The request has been reviewed and the information was determined to be releasable under 5 U.S.C. 552 and is as follows: The office of primary responsibility informed me material relied upon in making a decision to issue cure (show cause) notices for the subject contracts consisted of the PQDRs submitted as Attachment 2 to FOIA 2002-055. The results of 100% inspection by OC-ALC of shipments received in June/July 2001 were also a factor in issuance of the cure (show cause) notices. A summary of these results was provided in Attachment 1 to FOIA 2002-055.

No documents were provided to Plaintiff. The letter did not provide Plaintiff notice of its right to appeal Defendant's determination.

19. Upon belief, Defendant possesses "the results of 100% inspection by OC-ALC of shipments received in June/July 2001".

20. Plaintiff paid the fee of \$305.30 in full on 1 April 2002.

FOIA Request 2 (Number 02-056)

21. On 26 October 2001, Defendant received another of Plaintiff's FOIA requests via facsimile. This FOIA request is also dated 25 October 2001.

22. The letter requested various documents related to contracts and purchase orders F34601-99-D-0145-0001, F34601-99-D-0142-0001, F34601-00-C-0146, F34601-00-C-0040, F34601-00-C-0026, F34601-00-C-0298, and F34601-00-C-0015, which were awarded to Plaintiff by Defendant. The letter also referenced Termination Docket Numbers 2D01004, 2D01005, 2D01006, 2D01007, 2D01008, 2D01009, and 2D01010.

23. The request indicated that Plaintiff would be willing to pay \$300.00 for the requested documents, and that Defendant must contact Plaintiff before exceeding that amount:

The undersigned agrees to pay reasonable fees associated with this request. However, if you anticipate costs will exceed \$300.00, please advise the undersigned before incurring them. In your response, please refer to the instant

FOIA request by including a copy of it with your response.

24. On 20 November 2001, Plaintiff's undersigned counsel requested that Defendant modify the dollar limit set forth in Plaintiff's FOIA request from \$300.00 to \$4,000.00.

25. In a letter dated 30 November 2001, Defendant stated "[t]his office finds that additional time is needed to conclude processing; therefore, a response will be forwarded to you approximately 12 Dec 01."

26. Defendant supplied Plaintiff with a one page cover letter dated 7 February 2002, calling it an "(interim) response". The letter stated:

The attached documents have been determined clearly releasable under 5 U.S.C. 552, and are submitted responsive to your request at this time. The remainder is still undergoing its review and a response should be mailed to you approximately 01 March 02.

The letter did not inform Plaintiff of Defendant's decision whether the remaining documents were releasable.

27. Defendant did not request that Plaintiff pay any fees, instead, according to the same letter,

[t]he final fees will be assessed [sic] and charged at the finalization of your request. If you have any questions, you may contact the undersigned at 405-734-2633.

28. The letter did not provide Plaintiff notice of its right to appeal Defendant's determination.

29. As of 8 April 2002, Plaintiff has not received any further response from Defendant.

FOIA Request 3 (Number 02-105)

30. On 7 December 2001, Defendant received Plaintiff's FOIA request via facsimile. The FOIA request is dated 7 December 2001.

31. The letter requested assorted documents associated with contracts and purchase orders F34601-99-D-0145-0001, F34601-99-D-0142-0001, F34601-00-C-0146, F34601-00-C-0040, F34601-00-C-0026, F34601-00-C-0298, F34601-00-C-0015, F34601-99-C-0092, F34601-99-D-0186-0001, F34601-99-D-0186-0003, F34601-99-D-0186-0004, F34601-99-D-0145-0002, F34601-99-D-0151-0002, F34601-99-D-0142-0002, F34601-00-C-0017, F34601-00-C-0043, F34601-00-C-0059, and F34601-99-C-0093 that had been awarded to Plaintiff by Defendant. Additionally, Plaintiff referenced Termination Docket Numbers 2D01004, 2D01005, 2D01006, 2D01007, 2D01008, 2D01009, and 2D01010.

32. The request indicated that Plaintiff would be willing to pay \$3,000.00 for the requested documents, and that Defendant must contact Plaintiff before exceeding that amount:

The undersigned agrees to pay reasonable fees associated with this request. However, if you anticipate costs will exceed three thousand dollars (\$3000.00), please advise the undersigned before incurring them. In your response, please refer to the instant FOIA request by including a copy of it with your response.

33. Defendant supplied Plaintiff with a one page cover letter dated 11 February 2002, calling it an "(interim) response".

The letter stated:

The attached documents have been determined clearly releasable under 5 U.S.C. 552, and are submitted responsive to your request at this time. The remainder is still undergoing its review and a response should be mailed to you approximately 01 March 02.

The letter did not inform Plaintiff of Defendant's decision whether the remaining documents were releasable.

34. Additionally, Defendant's letter stated that items (4) and (5) were being referred to the Defense Contract Management Agency East.

35. Defendant's letter also stated:

[t]he final fees will be accessed [sic] and charged at the finalization of your request. If you have any questions, you may contact the undersigned at 405-734-2633.

36. Defendant's letter did not provide Plaintiff notice of its right to appeal Defendant's determination to the head of the agency.

37. On 11 March 2002, the Defense Contract Management Agency supplied Plaintiff with some documents responsive to items (4) and (5). The fees for duplication, search, and review were less than \$15.00 and were waived.

38. As of 8 April 2002, Plaintiff has received no further response from Defendant.

FOIA Request 4 (Number 2002-114)

39. On 14 December 2001, Defendant received Plaintiff's FOIA request via facsimile. The request is dated 14 December 2001.

40. Plaintiff's letter requested documents associated with the contracts and termination docket numbers listed in paragraph 31 of this complaint, as well as documents related to national stock numbers 2840-01-308-5488PR, 2840-01-308-5489PR, 2840-01-311-4797PR, 2840-01-311-7417PR, 2840-01-308-5490PR, 2840-01-322-6274PR, 2840-01-322-9807PR, 2840-01-322-6275PR, 2840-01-322-5354PR, 2840-01-322-6276PR, 2840-01-322-5355PR, and 2840-01-322-6277PF.

41. The request indicated that Plaintiff would be willing to pay \$5,000.00 for the requested documents, and that Defendant must contact Plaintiff before exceeding that amount:

The undersigned agrees to pay reasonable fees associated with this request. However, if you anticipate costs will exceed FIVE THOUSAND DOLLARS (\$5,000.00), please advise the undersigned before incurring them. In your response, please refer to the instant FOIA request by including a copy of it with your response.

42. Defendant supplied Plaintiff with a one page cover letter dated 11 February 2002, calling it an "(interim) response".

43. Defendant's letter stated:

The attached (requested) information was reviewed and determined fully releasable at this time, in response to your request, under 5 USC 552. The remainder is still undergoing its review and a response will be forwarded to

you approximately 01 March 02. We do apologize for any inconvenience this may cause you.

The letter did not inform Plaintiff of Defendant's decision whether the remaining documents were releasable.

44. In the letter, Defendant requested that Plaintiff pay a fee of \$244.50 for the furnishing of the documents.

45. Defendant's letter did not provide Plaintiff with notice of its right to appeal Defendant's determination.

46. Plaintiff paid the required fee in full on 1 April 2002.

47. On 8 April 2002, Plaintiff received a letter from Defendant dated 5 April 2002. The letter stated:

This office responded to you with an interim release on 11 February 2002, copy attached. I was discussing this request with Procurement/Contracting Personnel. I am attaching a copy of the letter which they had forwarded to this office in response to the referenced request, item by item. I was under the impression we had provided you an interim response; per the attached PKCA letter, your referenced request was answered in full. You were assessed fees of \$244.50 and your check #2287 was received; therefore we are considering this request closed. I apologize for any inconvenience this may of [sic] caused.

48. Defendant's letter did not provide Plaintiff with notice of its right to appeal Defendant's determination.

49. Upon belief, Defendant possesses additional documents responsive to Plaintiff's request.

COUNTS
Count I
(Failure to Respond)

50. Paragraphs 1 through 49 are incorporated by reference.

51. Defendant violated 5 U.S.C. §552(a)(6)(A)(i) and the U.S. Air Force implementing regulation, 32 C.F.R. 806.29(c)(2)(i), by failing to provide the requisite responses to Plaintiff as to its decision whether and how it will comply with Plaintiff's requests, its reasons for those decisions, and Plaintiff's right to appeal any adverse determinations.

52. Defendant violated 5 U.S.C. §552(a)(6)(B) by failing to notify Plaintiff of a need and basis for additional time (of up to 10 work days) to respond to its requests. Indeed, for FOIA request numbers 01-105 and 2002-114 of 7 December 2001 and 14 December 2001, respectively, Defendant did not respond until February 2002 with some documents and cover letters of 11 February 2002 that stated that the remainder of the documents were still under review. However, contrary to its 11 February letter, in a letter dated 5 April 2002 regarding request number 2002-114, Defendant now states that through the letter dated 11 February 2002, the request was "answered in full". As for Plaintiff's FOIA request number 02-056 of 25 October 2001, Defendant's letter of 30 November 2001 stated that Defendant would provide a response by 12 December 2001. Defendant did not respond until February 2002 with some documents and a cover letter dated 7 February 2002 that stated that the remainder of the documents were still under review.

Count II
(Failure to Exercise Due Diligence)

53. Paragraphs 1 through 49 are incorporated by reference.

54. Defendant violated 5 U.S.C. §552(a)(6)(C). Defendant failed to exercise due diligence in preparing a substantive response to Plaintiff's FOIA requests.

Count III
(Improper Withholding of Documents)

55. Paragraphs 1 through 49 are incorporated by reference.

56. Defendant violated 5 U.S.C. §552(a)(3) and §552(a)(4)(B) by improperly withholding documents requested by Plaintiff.

Count IV
(Failure to Conduct a Reasonable Search)

57. Paragraphs 1 through 49 are incorporated by reference.

58. Defendant violated 5 U.S.C. §552 by failing to conduct a reasonable search for records responsive to Plaintiff's FOIA requests.

WHEREFORE, Plaintiff prays that this Court grant the relief requested below.

Request For Relief

Wherefore, Plaintiff prays that this Court order the following relief:

1. Issue a declaratory judgment that Defendant violated the

above regulations;

2. Enjoin Defendant from withholding documents properly requested by Plaintiff;

3. Enter an order compelling Defendant to immediately supply the requested documents;

4. Enter an order awarding Plaintiff costs of pursuing this action, including attorney's fees and expenses;

AND

5. Any such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Lawrence J. Sklute", is written over a horizontal line.

Lawrence J. Sklute
D.C. Bar No. 433811

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Counsel For Plaintiff

Date Submitted: 8 April 2002